

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

Petition of  
Lincoln County, Oregon, and the  
Economic Development Alliance of  
Lincoln County, a non-profit corporation,  
for Declaratory Ruling and Preemption  
Pursuant to Section 253 of the  
Communications Act of 1934  
of Certain Provisions of the Oregon  
Telecommunications Utility Law

CC Docket No. 97-241

THE PUBLIC UTILITY COMMISSION  
OF OREGON'S RESPONSE  
EXPLAINING WHY THE PETITION  
FOR PREEMPTION SHOULD BE  
DENIED

# 1. INTRODUCTION

The Public Utility Commission of Oregon (OPUC) is responsible for regulating telecommunications service in Oregon. *See generally* Oregon Revised Chapters (ORS) 756 and 759. The OPUC agrees with the stated "pro-competitive" purpose of the Telecommunications Act of 1996 ("1996 Act") and is vigorously engaged in activities to bring competition to all areas of telecommunications service in Oregon. Indeed, Oregon is on the leading edge of implementing the 1996 Act's various provisions, including unbundling network elements and certifying competitive telecommunications service providers (CTSP).

The OPUC has certified over 400 CTSPs. As will be explained further below, the primary purposes of certification in Oregon are to ensure the successful applicant provides high quality service, that the applicant is accountable for problems with its service, and that the applicant makes proper contributions for universal service. These are appropriate concerns for the States under the 1996 Act. *See* 47 U.S.C. § 253(b).

The primary reason the OPUC denied the applications for certification filed by Lincoln County and the Economic Development Alliance of Lincoln County (together "Petitioners") is that they proposed to lease and resell telecommunications services solely from an uncertified telecommunications services provider. The OPUC's decision to deny

1 applications filed on such a basis is soundly based upon Oregon law and the unique facts  
2 presented by the applications. For the following reasons, the OPUC urges the Federal  
3 Communications Commission (FCC) to deny the Petitioners Petition For Preemption.

## 4 **2. SUMMARY OF ARGUMENT**

5 The OPUC's decision to deny the Petitioners' applications was based upon the  
6 unusual factual issues presented. Petitioners stated that they intended to lease and resell  
7 telecommunications services from an uncertified telecommunications carrier in Oregon. The  
8 OPUC properly concluded that the Petitioners could not be certified under these facts.

9 Further, the Petitioners' factual explanations of how they intend to provide  
10 telecommunications service have been fluid and unclear in the details. Petitioners suggest  
11 that their service plans involve only the leasing of "dark fiber." However, the Petitioners'  
12 evidentiary submissions to the OPUC are not clearly consistent with their representations.  
13 This unfortunate lack of precision arises partly from the fact that the Central Lincoln Public  
14 Utility District (CLPUD), the entity which proposes to lease network capacity to the  
15 Petitioners, has declined to participate in the OPUC's proceedings.

16 The Petitioners raise legal issues which involve interpretations of Oregon statutes.  
17 These legal disputes are unique to Oregon and are of no concern to the FCC. Indeed, the  
18 Petitioners have raised the same legal issues in their pending appeal of Order No. 97-373  
19 filed with an Oregon court. It is unnecessary, and would be inappropriate, for the FCC to  
20 become involved in this pending appeal.

21 What is important to the FCC is that Order No. 97-373 is consistent with the express  
22 areas of concern left to the States by 47 U.S.C. §§ 253(b) and 261. The matter also  
23 concerns the provision of intrastate service, a matter which is left to the States by 47 U.S.C.  
24 § 152(b).

25 ///

26 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32
- 33
- 34
- 35
- 36
- 37
- 38
- 39
- 40
- 41
- 42
- 43
- 44
- 45
- 46
- 47
- 48
- 49
- 50
- 51
- 52
- 53
- 54
- 55
- 56
- 57
- 58
- 59
- 60
- 61
- 62
- 63
- 64
- 65
- 66
- 67
- 68
- 69
- 70
- 71
- 72
- 73
- 74
- 75
- 76
- 77
- 78
- 79
- 80
- 81
- 82
- 83
- 84
- 85
- 86
- 87
- 88
- 89
- 90
- 91
- 92
- 93
- 94
- 95
- 96
- 97
- 98
- 99
- 100

The Economic Development Alliance of Lincoln County (EDA) filed its application for certification as a competitive telecommunications service provider with the OPUC on July 2, 1996 (docketed as CP 191). Lincoln County filed its application on September 3, 1996 (docketed as CP 215). The cases were consolidated. Both applications were identical as to the proposed services, and stated in relevant part:

On February 20, 1997, the Petitioners amended their applications, again identically, to read:

On May 30, 1997, the Petitioners submitted a letter which further explained their plans, included a copy of their intergovernmental agreement with the CLPUD, and again amended their applications. A copy of this letter is included as Attachment A. A copy of the intergovernmental contract is included as Attachment B. In response to a question from an intervenor, the Petitioners filed a letter on June 6, 1997, which further explained their plans. A copy of this June 6, 1997 letter is included as Attachment C.

111

1                                   **4. PETITIONER'S SERVICE PLANS**

2           The following summary of Petitioners' service plans shows that the CLPUD would  
3 provide a telecommunications service by leasing capacity on its network to the Petitioners.  
4 In Order No. 97-373, the OPUC properly concluded that the CLPUD itself required  
5 certification as a CTSP before it could lease network capacity to the Petitioners. The OPUC  
6 clearly implied that the Petitioners would be free to continue with their project once CLPUD  
7 was properly certified. To this date, the CLPUD has declined to file an application with the  
8 OPUC for certification as a CTSP.

9           **A.   OPUC Order No. 97-373 summarizes the known details of Petitioners'**  
10           **services plans.**

11           The OPUC's Order No. 97-373 is attached to Petitioners' Petition as Exhibit 1. In  
12 its Order, the OPUC accurately summarized the known details of the Petitioners' evolving  
13 service plan.

14           The CLPUD is in the business of providing electric power services in Oregon.  
15 Although the CLPUD did not participate in the OPUC proceedings, the Petitioners state that  
16 the CLPUD owns an extensive fiber optic network. According to Petitioners, the CLPUD  
17 believes it is prohibited by law from engaging in the business of providing  
18 telecommunications service. Accordingly, the CLPUD executed a contract with the  
19 Petitioners whereby the CLPUD will lease capacity on its network to the Petitioners. The  
20 Petitioners will purchase network components (switches and routers) and create a  
21 telecommunications network known as "CoastNet." Order No. 97-373 at 2-4.

22           The OPUC interpreted the Petitioners' applications, as amended, as requesting  
23 certification to provide interexchange, point-to-point private line services in increments of T1  
24 or greater by resale of CLPUD fiber. *Id.* at 2.

25    ///

26    ///

1           **B.     The contract between the CLPUD and Petitioners may involve more than**  
2                   **simply leasing and reselling dark fiber.**

3           The OPUC noted in Order No. 97-373 that the contract executed between the  
4 CLPUD and the Petitioners, describing the terms of their lease agreement, was filed late in  
5 the OPUC proceedings by the Petitioners, with little explanation. Thus, the OPUC did not  
6 expressly base its decision upon that contract. *Id.* at 8-9.

7           Nevertheless, a casual reading of the contract indicates that there may be more  
8 involved here than a lease of the CLPUD fiber (labeled "dark fiber" in Order No. 97-373).  
9 The following paragraphs use the labels found in the contract. *See* Attachment B.

10          In Section Three, the CLPUD retains control over how the Petitioners will resell the  
11 network.

12          In Section Four, the CLPUD retains ownership over the network it is leasing to the  
13 Petitioners. Importantly, the CLPUD also retains responsibility for maintaining the network  
14 capacity it is leasing.

15          Section Six delineates which of the CLPUD's network parts are at issue. The  
16 CLPUD agrees to:

17           \* \* \* furnish the capability of its private network to the data network user for  
18 a user fee of \$350.00 (THREE HUNDRED FIFTY DOLLARS and NO  
19 CENTS) per month per T1 capacity-capability \* \* \* T1 capacity is the  
20 more common expression of "DS1" capacity and refers to a digital signal  
21 level of 1:1.544Mbit/s or 24 DS0 channel capacity. The capability does not  
22 refer to physical cable in this agreement.

23           Network user may \* \* \* request technical assistance from [CLPUD] at the  
24 rate of \$75.00 per hour.

25          Section Seven provides that the CLPUD will exercise reasonable diligence "to avoid  
26 *interruptions in service under this agreement.*" (emphasis added).

          While it remains unclear, the contract thus suggests that the CLPUD will provide  
more than just a fiber optic line to Petitioners. Apart from the legal ramifications of  
CLPUD's activities, the more involved CLPUD is with providing wholesale network capacity

1 to Petitioners for resale telecommunications service, the greater the concern that the CLPUD  
2 be certified. Certification helps ensure that the public end-users receive quality service, and  
3 that the providers, like CLPUD, are accountable for problems which may arise with their  
4 network.

5  
6 **5. BASED ON THE KNOWN FACTS, THE OPUC PROPERLY APPLIED OREGON**  
7 **LAW TO CONCLUDE THAT THE PETITIONERS' APPLICATION SHOULD BE**  
8 **DENIED BECAUSE THE PETITIONERS INTENDED TO PURCHASE NETWORK**  
9 **ELEMENTS FROM AN UNCERTIFIED TELECOMMUNICATIONS PROVIDER**

10 The OPUC's rejection of the Petitioners' applications does not constitute a "barrier to  
11 entry" in violation of 47 U.S.C. § 253 (hereafter "Section 253"). The OPUC denied the  
12 applications because the Petitioners stated they intended to purchase network elements from  
13 an uncertified provider. Should the provider become certified, or should the Petitioners  
14 purchase from another certified provider, the OPUC would likely grant the Petitioners'  
15 amended applications ("likely" is used because a grant of authority would necessarily depend  
16 upon the known facts presented at the time the Petitioners submit their amended  
17 applications).

18 **A. Section 253 permits the OPUC's decision**

19 Section 253(d) states that the FCC may preempt any State legal requirement which  
20 violates Section 253(a) or (b).

21 Section 253(a) provides that no State may prohibit the ability of any entity to provide  
22 interstate or intrastate telecommunications service.

23 However, Section 253(b) provides the following important exception to Section  
24 253(a):

25 Nothing in this section shall affect the ability of a State to impose, on a  
26 competitively neutral basis \* \* \* requirements necessary to preserve and  
advance universal service, protect the public safety and welfare, ensure the  
continued quality of telecommunications services, and safeguard the rights of  
consumers.

///

1 As will be explained, the OPUC's decision to deny Petitioners' applications is consistent with  
2 Section 253(b). As the OPUC stated, "It is not in the public interest to grant an application  
3 which will involve purchase of service from an unauthorized seller." Order No. 97-373 at  
4 10.

5 **B. The OPUC correctly concluded, under Oregon law, that the Petitioners**  
6 **required a Certificate of Authority for CoastNet.**

7 The OPUC first addressed the Petitioners' argument that they did not need a  
8 certificate to provide their CoastNet service. Under Oregon law, the OPUC correctly  
9 concluded that providing CoastNet (interexchange, point-to-point private line services in  
10 increments of T1 or greater by resale of fiber) is a telecommunications service. *See* Order  
11 No. 97-373 at 5-8. The OPUC will briefly summarize its Order, but asks the FCC to review  
12 it in its entirety.

13 ORS 759.020(1) provides:

14 No person \* \* \* shall provide intrastate telecommunications service on a for-  
15 hire basis without a certificate of authority issued by the [OPUC].

16 The Petitioners first argued before the OPUC that Oregon's statutory definition of  
17 "telecommunications service" (as used in ORS 759.020) was so narrow that it did not include  
18 CoastNet. Specifically, the Petitioners asserted that CoastNet was not a telecommunications  
19 service because it encompassed non-switched point-to-point data communications.

20 Oregon's definition of "telecommunications service" provides in relevant part:

21 "Telecommunications service" means two-way switched access and transport  
22 of voice communications \* \* \*.

23 ORS 759.005(2)(g).

24 The OPUC has for many years interpreted ORS 759.005(2)(g) to mean two-way  
25 switched access *or* facilities which are *capable* of voice transmission, and all services  
26 provided in connection with such services. *See* Order No. 97-373 at 5-6; Oregon

1 Administrative Rule (OAR) 860-032-0001(10). The reasoning behind the OPUC's  
2 interpretation was first presented in its Order No. 92-345, reported at 131 P.U.R. 4th 187  
3 (*In the Matter of the Application of Electric Lightwave, Inc.*, Docket UM 381). A copy of  
4 the relevant pages of Order No. 92-345 are included as Attachment D.

5 The OPUC's interpretation of its statute defining "telecommunications service" is a  
6 matter for the OPUC and, perhaps someday, the Oregon courts. It is clearly not a matter  
7 with which the FCC need, or should, concern itself. Under this definition, the Petitioners'  
8 CoastNet project constitutes a telecommunications service because it will be capable of  
9 providing voice communications.

10 The Petitioners also argued that they were not providing "for-hire" service under  
11 ORS 759.020(1) and, thus, they did not need a Certificate of Authority. The Petitioners  
12 stated that they would be providing services to a limited number of customers, not the  
13 general public.

14 The OPUC rejected this argument, again based upon an interpretation of its own  
15 statute, as well as the particular facts. The OPUC concluded that the phrase "for-hire"  
16 simply meant remuneration of some sort, not the Petitioners' suggested interpretation that an  
17 offering must be made to the "general public." The OPUC also found, based on the  
18 evidence in the record, that the Petitioners would be providing the service to the public in  
19 any event. *See* Order No. 97-373 at 6-7.

20 Again, the OPUC's application of ORS 759.020(1) involves a matter of state law,  
21 which is properly reviewed by Oregon's appellate courts, not the FCC. The Petitioners filed  
22 their appeal of the OPUC's Order No. 97-373 to an Oregon court and will presumably raise  
23 this issue there. *See Lincoln County and Economic Development Alliance v. OPUC*,  
24 Marion County Circuit Court Case No. 97C-14075 (oral argument on briefs scheduled for  
25 April 17, 1998).

26 ///



1           **C.     Based upon the facts presented, and Oregon law, the OPUC properly**  
2           **concluded that CLPUD needs a certificate of authority.**

3           Preliminarily, the OPUC notes that the CLPUD did not appear in the proceedings,  
4 even though it was expressly invited to participate. Similarly, the CLPUD is not one of  
5 the Petitioners before the FCC. It is questionable whether the Petitioners may raise claims  
6 which lie with the CLPUD alone.

7           Nevertheless, the second major question the OPUC addressed was the issue of the  
8 CLPUD's lease of its network to the Petitioners.<sup>1/</sup> Again, at the very least, the CLPUD  
9 proposes to lease a part of its network capacity to the Petitioners. The OPUC described the  
10 CLPUD network in part as follows:

11           The Central Lincoln PUD has installed an extensive fiber optic and  
12           microwave network in Lincoln County and parts of a number of other  
13           counties. The network has significant excess capacity beyond that which the  
14           PUD will be using for its own purposes.  
15           Order No. 97-373 at 3.

16           The Petitioners' applications, and consequently the OPUC Order, refers to this  
17 capacity as "dark fiber." However, it is still unclear as to exactly what the CLPUD intends  
18 to do and lease, as illustrated by the contract it signed with the Petitioners. *See* Discussion  
19 above at Part 4; and Attachment B (the contract).

20           The OPUC found that the CLPUD's leasing of dark fiber to the Petitioners "is the  
21 provision for hire of facilities that have the capability of voice transmission." Order No. 97-  
22 373 at 8. Under Oregon law, this constitutes the provision of a telecommunications service.  
23 ORS 759.005(2)(g). The CLPUD's provision of a telecommunications service for-hire  
24 requires that it obtain a Certificate of Authority under ORS 759.020(1). *Id.*

---

25           <sup>1/</sup> An issue which the Petitioners did not adequately present to the OPUC was the legal effect, if any, of  
26 their contract. Petitioners generally asserted that the contract was an "ORS chapter 190" agreement with special  
significance. *See* Order No. 97-373 at 8-9.

          Like all other issues in this case, the legal impact of an "ORS chapter 190" agreement is a matter  
unique to Oregon, and has no relationship to the 1996 Act. Undoubtedly, the Petitioners will pursue this  
Oregon legal issue in their pending Oregon court appeal of Order No. 97-373.

1           The OPUC's conclusion about the CLPUD's provision of "dark fiber" is consistent  
2 with the prior OPUC decisions concerning "building blocks" (similar to unbundled network  
3 elements). The OPUC previously concluded that dark fiber is a building block under Oregon  
4 law. *See* Order No. 97-373 at 6, footnote 2 (citing to Order Nos. 96-188; 96-283; and 97-  
5 021).

6           While the OPUC's conclusion about CLPUD's dark fiber is a matter properly  
7 decided under Oregon law, the OPUC notes that the FCC expressly declined to address the  
8 unbundling of "dark fiber." *See* FCC Order 96-326, Paragraph 450. Thus, the OPUC's  
9 decision in Oregon to unbundle dark fiber is not inconsistent with the FCC's actions in this  
10 area.

11           **D. The OPUC expressly found its Order to be consistent with Section 253.**

12           Finally, the OPUC addressed the Petitioners' argument, presented again in their  
13 present petition to the FCC, that denial of their applications would violate Section 253(a).  
14 The OPUC first noted that:

15           [Oregon's] statutes and regulations protect the public safety and welfare and  
16 ensure the quality of the service. They are also designed to protect the rights  
of consumers and to further our goal of ensuring universal service \* \* \*.

17           Order No. 97-373 at 7.

18           The OPUC then considered whether, based on the prior findings and conclusions, the  
19 Petitioners' application should be granted. The OPUC concluded that the Petitioners'  
20 applications, as presented, were not in the public interest:

21           The applications \* \* \* involve the purchase or leasing of facilities from the  
22 CLPUD. As we have noted, the CLPUD must have a certificate to provide  
that service. It does not have a certificate and had not applied for one. It is  
23 thus not an authorized seller of that service. CLPUD would violate ORS  
759.020(1) if it provided the proposed service to Lincoln County and the  
24 Alliance. It is not in the public interest to grant an application which will  
involve the purchase of service from an unauthorized seller. To do so would  
25 be to sanction unlawful acts. We will therefore deny the applications of  
Lincoln County and the Alliance.  
*Id.* at 10.

26           ///

1           The OPUC's well-reasoned decision to deny the Petitioners' applications, based on  
2 the facts presented in their applications, does not create a barrier to entry subject to  
3 preemption under Section 253. The Petitioners' applications were denied upon the unique  
4 facts presented, chiefly that entity from whom the Petitioners would be leasing network  
5 services was not certified to do so in Oregon. Further, as discussed above, certification is  
6 permissible under the 1996 Act because it protects the public safety and welfare by  
7 identifying, and providing the OPUC a means to hold accountable, entities who lease  
8 network capacity for the provision of telecommunications service to the public.

9           Finally, the CoastNet service proposed by petitioners concerns an intrastate matter  
10 which Congress expressly reserved to the States. See 47 U.S.C. §§ 152(b) and 261.

11           **E. Order No. 95-842 will be reviewed**

12           Finally, the OPUC has reviewed Exhibit 2 to Petitioners' petition. Exhibit 2 is a  
13 copy of OPUC Order No. 95-842 which granted the application of LandsEdge  
14 Communications, Inc. ("LandsEdge") for a Certificate of Authority. Petitioners state that  
15 Order No. 95-482 granted LandsEdge's application even though it involved the use of the  
16 CLPUD's dark fiber. Petition at 4.

17           The application underlying Order No. 95-482 did not expressly present the issues  
18 presented by the Petitioners' application. The OPUC will review with LandsEdge how it is  
19 providing service. If necessary, the OPUC will take appropriate action to ensure that  
20 LandsEdge is providing service not inconsistent with Order No. 97-373.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///


## 6. CONCLUSION

The OPUC asks the FCC to deny the Petitioners petition.

DATED this 6<sup>th</sup> day of January 1998.

Respectfully submitted,

HARDY MYERS  
Attorney General

  
Michael T. Weirich #82425  
Assistant Attorney General  
Of Attorneys for Public Utility Commission of Oregon

slg/MTW0891.PLE

CERTIFICATE OF SERVICE

I certify that on the 6<sup>th</sup> day of January 1998, I served the foregoing PUBLIC UTILITY COMMISSION OF OREGON'S RESPONSE EXPLAINING WHY THE PETITION FOR PREEMPTION SHOULD BE DENIED upon the following persons by mailing, regular mail, postage prepaid, a true, exact and full copy thereof to:

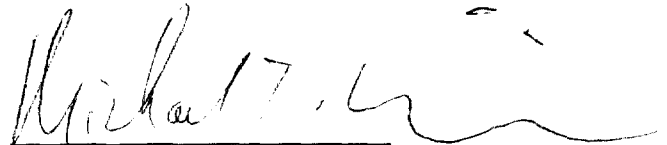
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Janice M. Myles  
Common Carrier, Bureau, FCC  
Room 544, 1919 M Street, N.W.  
Washington, DC 20036

Robert E. Bovett  
Lincoln County Counsel  
110 Lincoln Co. Courthouse  
225 W. Olive Street  
Newport, OR 97365

ITS, Inc.  
1231 20th Street, N.W.  
Washington, DC 20036

Mark P. Trinchero  
Davis Wright, Tremaine LLP  
Suite 2300, 1300 S.W. 5th Ave.  
Portland, OR 97201



Michael T. Weirich, #82425  
Assistant Attorney General  
Of Attorneys for PUC Staff



# OFFICE OF LINCOLN COUNTY LEGAL COUNSEL

225 West Olive Street, Room 110

Newport, Oregon 97365

(541) 265-4108

Fax: (541) 265-4176

**Wayne Belmont**

County Counsel

**Rob Bovett**

Assistant County Counsel

**Judy Eames**

Legal Assistant

May 30, 1997

Allen Scott  
Administrative Law Judge  
Oregon Public Utility Commission  
550 Capitol Street NE  
Salem, OR 97310-1380

Sent by FAX to (503) 378-6163  
and by Regular Mail

RE: *Application of Lincoln County and Economic Development Alliance for a  
Certificate of Authority to Provide Telecommunications Services,*  
PUC docket numbers CP 215 and CP 191

**RECEIVED**  
JUN 02 1997

GENERAL COUNSEL  
DEPT. OF JUSTICE  
SALEM, OREGON

Your Honor,

Yesterday, staff from the PUC and the DOJ met with staff from the County and the Central Lincoln PUD to discuss the status of the above entitled actions.

At that meeting it became clear that, in the various legal memoranda that I have filed on behalf of the County, I have failed to provide a clear and concise description of the legal framework for the Coastnet project as a whole. It also became clear that there are technical corrections that should be made to paragraph 8 of the applications. The purpose of this letter is to make those clarifications, and ask that you and the Commission consider those clarifications before you issue any final order in this case.

## THE COASTNET PROJECT

### The Fiber

The Central Lincoln PUD has installed an extensive fiber optic and microwave network in Lincoln County and parts of a number of other counties. This network has significant excess capacity beyond that which the PUD will be using for its own purposes. This excess capacity affords a tremendous opportunity for economic development along the central Oregon coast. However, there is some question as to whether the PUD has the legal authority to engage in telecommunications services. Therefore, through an ORS chapter 190 intergovernmental agreement, the PUD has agreed to share that excess capacity with Lincoln County. The effect of that agreement is a sharing of authority and powers between the County and the PUD for purposes of the excess capacity. ORS 190.030. Mr. Weirich requested a copy of that intergovernmental agreement, which I have enclosed with his copy of this letter. If you or any of the other parties would like to see that agreement, please let me know and I would be happy to forward a copy.

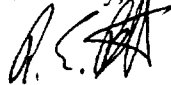
### The Switches

The Economic Development Alliance of Lincoln County, a non-profit corporation, has obtained a grant from the Oregon Economic Development Department for the purchase and installation of a number of fiber optic routers and switches.

Coastnet Project  
May 30, 1997  
Page 2 of 3

Although I do not represent the Alliance, I have spoken with Ed Parker, Chair of the Alliance's Board of Directors, who has given me special authority to request that paragraph 8 of the Alliance's application also be amended to reflect the language recited above.

Sincerely,



Rob Bovett  
Assistant County Counsel

pc: Richard Potter  
Attorney at Law  
GTE Northwest  
1800 41<sup>st</sup> Street  
Everett, WA 98201

Molly Hastings  
Attorney at Law  
US WEST  
1600 7<sup>th</sup> Avenue, Suite 3206  
Seattle, WA 98191

✓ Michael Weirich  
Assistant Attorney General  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97310

Peter Gintner  
Attorney at Law  
Central Lincoln PUD  
PO Box 1270  
Newport, OR 97365

Chris Chandler DiTorrice  
Economic Development Alliance  
PO Box 930  
Depoe Bay, OR 97341-0930

Ben Doty  
Central Lincoln PUD  
PO Box 1126  
Newport, OR 97365

Don Mason  
US WEST  
421 SW Oak Street, Room 859  
Portland, OR 97204

Dave Overstreet  
GTE Northwest  
PO Box 1100  
Beaverton, OR 97075-1100

Joe Madraso  
Pioneer Telephone Cooperative  
PO Box 631  
Philomath, OR 97370-0631

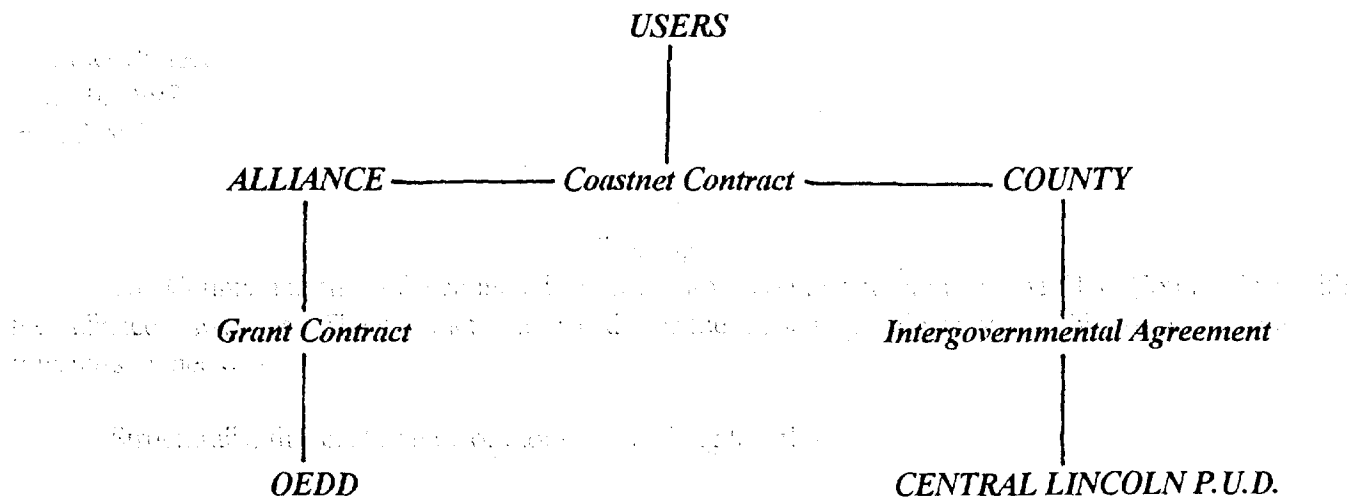
Ed Parker  
Economic Development Alliance  
PO Box 402  
Gleneden Beach, OR 97388

Michael Gaston  
Siuslaw Public Library District  
PO Box A  
Florence, OR 97439

### The Network

The County and the Alliance intend to enter into a contract to combine the PUD/County fiber with the Alliance's switches. The contract will provide for the marketing and use of this high-speed digital data transmission network.

Structurally, the legal framework looks something like this:



Family wage jobs are disappearing from traditional Lincoln County industries (timber and fishing). A primary focus of the County's long-term economic development plan is to attract high-technology manufacturers and services to Lincoln County. A key component identified in the plan to attract those types of businesses is a high-speed telecommunications network. Coastnet is specifically designed to accomplish that goal.

### AMENDMENT TO APPLICATIONS

In order to more accurately reflect the intention of the Coastnet project, paragraph 8 of the County application should be amended to read:

"Applicant will be a reseller of data communications services, utilizing a fiber optic network known as Coastnet, which will be comprised of transport capacity contributed by the County through intergovernmental agreement with the Central Lincoln People's Utility District, and switches and routers contributed by the Economic Development Alliance."



## **EXHIBIT "A"**

The demarcation point is the fiber optic data communication cabinet in the Computer Services Department of the Lincoln County Courthouse, 225 West Olive Street, Newport, Oregon. A topographical map will be provided at a future date. The parties reserve the right to add additional demarcation points by mutual agreement.

## INTERGOVERNMENTAL ("190") AGREEMENT

Agreement made December 30, 1996, by and between CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT (DISTRICT), duly organized and existing under the laws of the State of Oregon, having its principal office at Newport, Oregon, and LINCOLN COUNTY (COUNTY) a political subdivision of the State of Oregon, having its principal office at Newport, Oregon.

### Recitals

WHEREAS, under ORS 190.007, the Oregon legislature has declared a statewide concern of promoting intergovernmental cooperation for the purposes of furthering economy and efficiency in local government; and

WHEREAS, under Chapter 203, COUNTY is authorized to enter agreements for any lawful purpose; and

WHEREAS, under ORS 190.010, COUNTY is authorized to enter into intergovernmental agreements; and

WHEREAS, under ORS Chapter 261, DISTRICT is authorized to enter agreements for any lawful purpose; and

WHEREAS, under ORS 190.010, DISTRICT is authorized to enter into intergovernmental agreements; and

WHEREAS, COUNTY and the DISTRICT deem it to be in the best interests of their respective constituencies to enter into an agreement which allows COUNTY to have access to the capability of the DISTRICT's private communications network, under the conditions and terms described in this Agreement and its Exhibits and Amendments; and

WHEREAS, DISTRICT is engaged in the distribution and sale of electric power requiring DISTRICT to maintain a communications network, and there is capability, on this communications network, which is temporarily not required by the DISTRICT for its own uses; and

WHEREAS, COUNTY is engaged in general local governmental services; and

WHEREAS, COUNTY has the need for data communications capability; and

WHEREAS, the local area network (LAN) of COUNTY will maintain a demarcation point to the DISTRICT'S network as shown on Exhibit A, and operate as part of the DISTRICT'S private network; and

WHEREAS, it is the desire of the parties to make mutual use of such interoperability and interconnection.

In consideration of the above recitals and the mutual covenants set forth below and of the public benefits expected to be derived from this agreement, the parties agree as follows:

## **SECTION ONE DEFINITIONS**

- A. The term "private network" as used in this agreement, shall apply to the DISTRICT.
- B. The term "network user" as used in this agreement, shall apply to COUNTY.
- C. The term "demarcation point" shall mean a point on the DISTRICT'S network to which COUNTY shall bring its access line for its terminal equipment. Specifically this point shall be at the network user's Channel Service and Data Service Units (CSU/DSU).

## **SECTION TWO TERM**

This agreement will become effective on December 30, 1996 and will thereafter remain in effect for succeeding terms of one (1) year each unless canceled by six (6) months written notice by either party to the other party, prior to the expiration of any term of this agreement, of its intention to terminate.

## **SECTION THREE GENERAL OBLIGATIONS AND LIMITATIONS**

During the term of this agreement, the DISTRICT will provide network access to its private network and COUNTY will have such access at its demarcation point, and ability to access "Internet" service(s), and such facility and access will not be sold to other purchasers or users except in each instance by and with the written consent of the DISTRICT.

## **SECTION FOUR FACILITIES OWNERSHIP**

The DISTRICT will continue to own its private communications network and COUNTY will continue to own its LAN up to the demarcation point with the DISTRICT'S network, and each party will be responsible for maintenance and operability of its own equipment and facilities, unless otherwise specified by an Exhibit to this Agreement. Interconnection of the networks will be functional and will not imbue ownership other than that which existed with the parties prior to the interconnection.

## **SECTION FIVE STANDARDS**

The DISTRICT shall determine and inform COUNTY at the beginning of this Agreement and whenever necessary of standards of interconnectivity to the private network in order that the best mutual use can be made of the parties' interconnectivity.

## **SECTION SIX NETWORK USER FEES AND BILLINGS**

Subject to the terms and conditions of this Agreement, DISTRICT will furnish the capability of its private network to the data network user for a user fee of \$350.00 (three hundred fifty dollars and no cents) per month per T1 capacity-capability. This amount will be due and payable to the DISTRICT by the network user at the address shown in the Notice Section (Section Thirteen), upon receipt of the monthly billing statement. T1 capability is the more common expression of "DS1" capacity and refers to a digital signal level of 1:1.544Mbit/s or 24 DS0 channel capacity. The capability does not refer to physical cable in this agreement.

Network user may from time to time under this agreement request technical assistance from DISTRICT personnel and DISTRICT will, upon agreement with an authorized person representing the network user, charge at the rate of \$75.00 per hour for such technical assistance. Any network user will be notified of any change in this hourly rate.

Additional charges or rates for expanded network services or addition of network capability will be made by the DISTRICT if those needs arise and can be agreed upon by parties and can become an Amendment to this Agreement.

## **SECTION SEVEN CONTINUITY OF SERVICE AND EMERGENCIES**

The DISTRICT will exercise reasonable diligence to avoid interruptions in service under this agreement, and will not be liable for any damage or loss occasioned by any failure or interruptions caused by fires, strikes, riots, floods, lightning or storms, Acts of God, civil disturbances, action of public authority, litigation, breakdowns, or causes beyond reasonable control.

## **SECTION EIGHT LIABILITY**

Each party to this Agreement will indemnify and hold harmless the other party against any and all loss, cost, damage or expense, including attorney fees, for, or by reason of, any claim for injury to its own employees at any location and to persons or property occasioned by the equipment owned or operated by it however caused. Neither party assumes any responsibility for the equipment of the other party.

## **SECTION NINE GOVERNING LAW**

It is agreed that this agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Oregon.

**SECTION TEN  
ENTIRE AGREEMENT**

This agreement shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this agreement shall not be binding upon either party except to the extent incorporated in this agreement.

**SECTION ELEVEN  
ATTORNEY FEES**

In the event that any action is filed in relation to this agreement, the unsuccessful party in the action shall pay to the successful party, in addition to all sums that either party may be called upon to pay, a reasonable sum for the successful party's attorney's fees.

**SECTION TWELVE  
EFFECT OF PARTIAL INVALIDITY**

The invalidity of any portion of this agreement will not and shall not be deemed to affect the validity of any other provision.

**SECTION THIRTEEN  
NOTICES**

Any notice provided for or concerning this agreement shall be in writing and shall be deemed sufficiently given when sent by certified or registered mail if sent to the respective address of each party, to the attention of the Agreement's signatories as listed below:

Diane Killian  
Computer Services Director  
Lincoln County  
225 W. Olive Street, Room #101  
Newport OR 97365

Paul Davies  
Technical Services Manager  
Central Lincoln PUD  
P.O. Box 1126  
Newport, OR 97365

**SECTION FOURTEEN  
BINDING EFFECT**

This Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

**SECTION FIFTEEN  
PARAGRAPH HEADINGS**

The titles to the paragraphs of this agreement are solely for the convenience of the parties and shall not be used to explain, modify, simplify or aid in the interpretation of the provisions of this Agreement.


**SECTION SIXTEEN  
WAIVER**

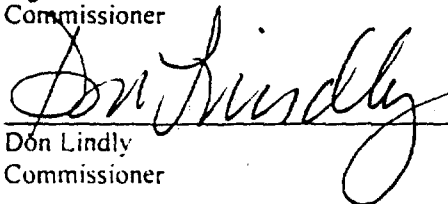
Central Lincoln P.U.D. in its roles as private network manager, capacity facilitator, equipment owner and maintainer bears no responsibility for any person's or fiber user's electronic access to written, graphic or other material, on the "Internet" or elsewhere, that may be considered obscene, pornographic, violent or otherwise unsuitable.

In witness whereof, each party to this Agreement has caused it to be executed at Newport, Oregon, on the date indicated below.

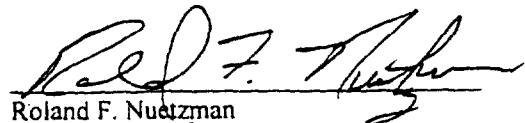
Dated this day of December 30, 1996  
For Lincoln County Board of Commissioners

  
Nancy E. Leonard  
Chair

  
Jean Cowan  
Commissioner

  
Don Lindly  
Commissioner

Dated this day of December 30, 1996  
For Central Lincoln P.U. D.

  
Roland F. Nuetzman  
General Manager



**OFFICE OF LINCOLN COUNTY LEGAL COUNSEL**

225 West Olive Street, Room 110

Newport, Oregon 97365

(541) 265-4108

Fax: (541) 265-4176

**Wayne Belmont**

County Counsel

**Rob Bovett**

Assistant County Counsel

**Judy Eames**

Legal Assistant

June 6, 1997

Richard Potter  
Associate General Counsel  
GTE Northwest  
PO Box 1003  
Everett, WA 98206-1003

RE: *Application of Lincoln County and Economic Development Alliance for a  
Certificate of Authority to Provide Telecommunications Services,  
PUC docket numbers CP 215 and CP 191*

Dear Mr. Potter,

I have received your letter dated June 3, 1997, relating to my letter dated May 30, 1997. Enclosed is a copy of the intergovernmental agreement that you requested.

You also pose a question concerning the "users" of the Coastnet system. As previously described, the contract between the County and the Alliance will combine the Alliance's switching capacity with the County's transport capacity. The contract will most likely appoint the Alliance as the entity responsible for offering the bundled Coastnet service to users. Some users will be end use customers who will contract directly with the Alliance for the bundled Coastnet service. Others will be third party resellers (who will be required to have a Certificate of Authority from the PUC), who would resell bundled Coastnet service to end use customers.

I hope this additional explanation has been of assistance. Please don't hesitate to contact me if you have any questions or concerns.

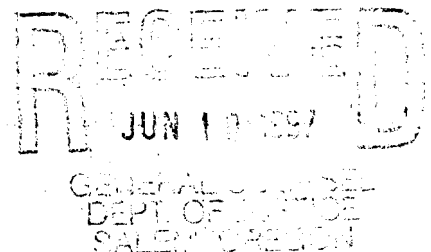
Sincerely,

Rob Bovett

Assistant County Counsel

enc: Intergovernmental agreement

Attachment C



pc (w/o enc): Allen Scott  
Administrative Law Judge  
Oregon Public Utility Commission  
550 Capitol Street NE  
Salem, OR 97310-1380

Michael Weirich  
Assistant Attorney General  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97310

Chris Chandler DiTorrice  
Economic Development Alliance  
PO Box 930  
Depoe Bay, OR 97341-0930

Don Mason  
US WEST  
421 SW Oak Street, Room 859  
Portland, OR 97204

Joe Madraso  
Pioneer Telephone Cooperative  
PO Box 631  
Philomath, OR 97370-0631

Michael Gaston  
Siuslaw Public Library District  
PO Box A  
Florence, OR 97439

Molly Hastings  
Attorney at Law  
US WEST  
1600 7<sup>th</sup> Avenue, Suite 3206  
Seattle, WA 98191

Peter Gintner  
Attorney at Law  
Central Lincoln PUD  
PO Box 1270  
Newport, OR 97365

Ben Doty  
Central Lincoln PUD  
PO Box 1126  
Newport, OR 97365

Dave Overstreet  
GTE Northwest  
PO Box 1100  
Beaverton, OR 97075-1100

Ed Parker  
Economic Development Alliance  
PO Box 402  
Gleneden Beach, OR 97388



Private line service is basically an alternative to the regular switched network. It provides direct connection between two or more points and is used primarily by companies wanting to communicate among branch offices or plants. The switched network can be used instead. ...

A complicating factor is the nature of private line service: it is a non-switched system that transmits audio, video and data signals in addition to voice signals. This proceeding is concerned with the public switched network.

Order No. 88-1522 does not decide the present issue. As discussed above, that rulemaking proceeding was held to determine which of the services provided by telecommunications utilities were "essential" under ORS 759.195. There was no evidentiary record and the exact character of services as switched or unswitched was not an issue in the proceeding. In fact, the Commission noted that some switching may occur even with services identified as "private line."

ELI also contends that its proposed services are not "telecommunications services" under ORS 759.005(2)(g) because they are not switched. To accept this interpretation, the Commission must ignore part of the statute and its effect. The section must be viewed as a whole and in context.

For the definition of "telecommunications service" in ORS 759.005(2)(g) to make sense, the word "and" must be construed to mean "or" or "as well as."<sup>8</sup> Only then do the sections fit sensibly together. For example, if "and" were used only in the conjunctive sense, the exception for "one-way transmission of television signals" would have been unnecessary. *One-way* transmission of television signals is not *two-way switched access* (subparagraph (B)). Accordingly, ORS 759.005(2)(g) defines "telecommunications service" as "two-way switched access [as well as] transport of voice communications." Further, since its enactment, the Commission has interpreted this definition to mean the provision of facilities which are *capable of voice transmission*, whether or not that is the actual use.<sup>9</sup> ELI's proposed service is intrastate, point-to-point, local exchange transmis-

---

<sup>8</sup>The word "and" may be construed to mean "or" when necessary to effectuate the intention of the legislature and to avoid an unreasonable or absurd result. *Ollilo v. Clatskanie People's Utility District*, 170 OR 173, 180, 132 P2d 416 (1942).

<sup>9</sup>Although this matter is not an issue in this case, it is important to explain why the Commission's jurisdiction extends over facilities "capable of voice transmission." With modern telecommunications technology, there is no distinction between the manner in which voice or data moves through fiber optic networks. Both types of communications are translated into digital "O's" and "1's" to increase both the speed and amount of the information transmitted. Because there is no distinction between the facilities used to transmit voice and data and because policing on the basis of the type of information transmitted would be an impossibility, the Commission's jurisdiction must to apply to facilities capable of voice